82-1116

Supreme Court, U.S.
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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

JEFFREY ALTMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

1. Whether the Court below properly construed its decision and the law in *United States v. Beecroft* (1979, 9th Cir.) 608 F.2d 753 and *United States v. Piepgrass* (1970, 9th Cir.) 425 F.2d 194, where it held that an intent to defraud may be inferred from knowledge that a scheme operates in a deceitful manner.

2. Whether the Court below properly construed its decision and the law in *United States v. Kaplan* (1977, 9th Cir.) 554 F.2d 958, where it held that the intent to defraud may also be inferred from a failure to put a stop to a deceitful scheme.

3. Whether it was error on the part of the Court below in failing to base its judgment on the decisions and the law in *United States v. Windsor* (1967, 9th Cir.) 384 F.2d 535 and *Walker v. United States* (1966) 384 U.S. 952, 86 S.Ct. 1573, 16 L.Ed.2d 548.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JEFFREY ALTMAN, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported. A copy of the opinion appears in Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 27, 1982. A timely petition for rehearing was denied November 30, 1982. A copy of the decision of the Court of Appeals appears in Appendix B hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statute Involved.

18 U.S.C. Section 1341.

Statement.

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on twenty counts of an indictment charging the defendant Jeffrey Altman with mail fraud in violation of Title 18 U.S.C. Section 1341. In essence, it alleged a two-part scheme: (1) to solicit advertisements for a business directory without the intention of ever publishing; and, (2) to send invoices to the business even though no advertisement had been ordered.

As an association, Steven Powers and Mark Fishman purchased a publication known as the "Big Book of Metalworking Machinery" (hereinafter referred to as "BBMM"), for $14,000.00 cash and note from a company known as Zulch and Zulch (R.T.* 41-44). The assets were then transferred to Lexington Corporation, owned sixty percent by Powers and forty percent by Fishman. Together, Fishman and Powers called the advertisers to solicit the sale of a new edition of BBMM containing their advertisements (R.T. 45). From August to December, 1975, approximately five

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*R.T. refers to the Reporter's official transcript of petitioner's trial.

or six ads were sold for the new edition at $300.00 per ad (R.T. 82-83).

In November, 1975, a meeting was held between Powers, Fishman, Skala and petitioner wherein an agreement was reached, in principle, to merge Lexington Corporation into MCB Systems, Inc. (hereinafter referred to as "MCB") (R.T. 56). MCB was a public corporation with approximately 1170 shareholders, engaged in diversified operations with its main activity being a brokerage house for a barter system (R.T. 791-2). The merger was predicated upon an idea to expand directory advertisement sales into the area of the banking industry. MCB had published a directory in connection with its barter system activities and it was thought that MCB would therefore have the ability to use its existing resources to economically put together a directory in another area.

An agreement for reorganization between Lexington and MCB was drafted by Fishman, an attorney, and was signed by Powers, Fishman, Skala and petitioner on February 23, 1976. The agreement provided in substance that Lexington would first issue shares of stock to Skala and petitioner, and additional shares of stock to Powers. Skala, petitioner and Powers would each have 30% of Lexington's stock and Fishman would have approximately 10% (R.T. 56-58). Thereafter, Powers, Fishman, petitioner and Skala would all exchange their Lexington stock for MCB stock and the two companies would merge (R.T. 57). Fishman filed with the Department of Corporations for approval to sell shares to effectuate the merger. Eventually, the merger was withdrawn. While the agreement was signed in February, 1976, Lexington Corporation had already transferred its operations to the offices of MCB in December.

At a February meeting, Steve Powers raised the name of Elaine Pector as a person with prior experience selling ads

for a banking directory (R.T. 160). It was recommended that she would be a good employee to operate Lexington's sales operations and could solicit ads for an expanded version of the original book to include banks and other industries called the "Big Book of Banking and Industry" (hereinafter referred to as "BBBI") (R.T. 146, 287). Powers testified that Pector had worked for him on a trial basis in December, 1975, but that she had to be controlled (R.T. 47, 64). It was decided that Powers would contact and attempt to negotiate an employee contract with Pector.

Pursuant to her publishers agreement, Pector hired a small sales force to assist her in the solicitation and sale of ads of which she would also make a commission (R.T. 562). These solicitations normally took place between 6:00 AM and 11:00 AM before Skala and Altman arrived, because of the time zone difference on the East Coast as well as the lower phone rates (R.T. 572). They had their own sales area, separate and apart from Skala and Altman. Lexington was only a small part of MCB system.

Mark Fishman became the liaison between Pector and MCB (R.T. 287). During this relationship, Pector never informed Fishman of what she was doing (R.T. 288). Fishman testified he never saw Pector nor was he involved in any way with her billing of clients (R.T. 272-3, 288). Fishman testified he never heard Pector make misrepresentations (R.T. 249). Pector did, however, show Fishman complaint letters about her from three state attorney generals, and he in turn showed them to Skala and made Altman aware of them (R.T. 165-6).

After discussing these complaint letters with Skala, Fishman told Skala he no longer wanted to be involved with the business operation of Lexington and would restrict his activities to being MCB counsel (R.T. 184-5). Thereafter, Fishman resigned as President of Lexington (R.T. 282-3).

In addition, Fishman was to respond to the complaints as corporate counsel. Petitioner testified that Fishman informed him that he had handled the complaints and that there was no problem (R.T. 880).

In late April, 1976, Skala asked petitioner to become President of Lexington Corporation. Even though Altman primarily ran the insurance division of MCB, petitioner agreed since his functions at MCB would not change (R.T. 859-61). His duties at Lexington were twofold. First, he would act as liaison between Fishman and Pector, and second, he would process Pector's commission checks (R.T. 741, 768-9, 861-2). Pector never reported to petitioner and he never regulated or monitored her sales routine (R.T. 861-68). Petitioner and Pector constantly argued over her commission checks (R.T. 865).

The defense stipulated that on or about August 13, 1976, Skala created a fictitious person, Yashika Mitsibishi, who was created to find an easy way to terminate Elaine Pector's sales contract with Lexington Corporation (R.T. 805-8). On August 19, 1976, Skala gave Pector a letter informing her that Yashika Mitsibishi wished that all sales personnel be dismissed (R.T. 504). When Pector confronted Skala as to the dismissal of her sales personnel, Skala informed her that there was room for her in "collections" to follow up her sales of advertising (R.T. 505-6).

Pector states that Skala told her the reason for the shift from "sales" to "collections" was because BBBI was going to be printed (R.T. 505). Thereafter, a few printers testified that Skala consulted them about estimates to print the BBBI. Skala was given estimates between $5,000.00 and $10,000.00 (R.T. 673, 680).

Skala testified that he designed a computer system to keep track of what companies owed money to Lexington and for

how long. The system was designed so that if someone didn't pay, the computer would automatically write them a letter informing them their account was overdue. Delinquent notices would automatically be sent out by the computer at 30-day intervals unless payment was received and credited to their account (R.T. 743-45).

Skala testified that Pector was in charge of generating input into the computer as to who owed what (R.T. 745). She had her secretary type up a statement and had a copy sent to the computer center for input (R.T. 745). When payments were received, Pector's cousin, Eileen, would mark them off on a roster and send them over to Datagraphics for input (R.T. 748).

The first set of overdue notices were sent out on or about August 26, 1976. Pector was aware these were going to be sent out (R.T. 506). Thereafter, but before the second batch was sent out, Pector informed Skala there were errors or complaints on the first computer run (R.T. 512). Pector could not recall discussing these complaints with petitioner (R.T. 512). Pector testified that Skala told her it was a mistake, computer error (R.T. 514). Skala testified that he told Pector that all she had to do is prepare adjustment slips and once submitted to the computer, the errors would be corrected (R.T. 753). As to the complaints, Skala asked Pector if it was something she could handle and, if so, she should. Otherwise, she should see Fishman about it. She replied, "Fine" (R.T. 754). Skala never reviewed Pector's invoices or correspondence (R.T. 820). Skala was totally unaware of the complaints as evidenced by the stipulations (R.T. 754). On or about October 21, 1981, a second batch of delinquent notices were sent out (R.T. 19E).

On or about October of 1976, Harold Shafer contacted petitioner regarding the sale of BBMM and the BBBI (R.T. 404-5). While petitioner handled the preliminary negotia-

tions, he referred Shafer to Skala about price (R.T. 870, 406). Petitioner did, however, show Shafer a list of BBBI's accounts receivable (R.T. 409-10). After receiving a computerized analysis of Lexington, Skala decided to sell the BBBI to Shafer (R.T. 788-9, 786). By agreement of November 16, 1976, Harold Shafer bought all rights to the BBBI. By said contract, Shafer expressly assumed the obligations to publish the BBBI.

REASONS FOR GRANTING WRIT.

Petitioner argues that the Court incorrectly ruled in its factual analysis as well as its reliance on *United States v. Beecroft* (1979, 9th Cir.) 608 F.2d 753, *United States v. Piepgrass* (1970, 9th Cir.) 425 F.2d 194 and *United States v. Kaplan* (1977, 9th Cir.) 554 F.2d 958. The Court's reliance indicates that an intent to defraud may be *inferred* from a failure to stop a deceitful scheme. However, such reliance is contrary to the case of *United States v. Windsor* (1967, 9th Cir.) 384 F.2d 535 where it was held that his knowing participation in a scheme to defraud is an essential part of the government's case. This element may be established circumstantially, but cannot be based upon constructive knowledge because of facts known to others with whom appellant was involved in the scheme. Moreover, the case of *Walker v. United States* (1966) 384 U.S. 952, 86 S.Ct. 1573 held that circumstantial evidence may well be as trustworthy as direct evidence, but we must be mindful that the requisite mental state in a prosecution for fraud is specific intent to defraud and not merely knowledge of shadowy dealings.

Petitioner argues that the inferences relied upon, as well as the legal conclusions relied upon, were insufficient to establish his conviction as a result of the fact that they imputed to him constructive knowledge of acts undertaken by others in furtherance of the alleged scheme. In the event the Court's interpretation is held correct, there would be virtually no bar to conviction for mail fraud based upon constructive knowledge.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and ruling of the Court of Appeals of the Central District of California.

Respectfully submitted,

BROWN, BARON & MADDEN,

By PAUL FITZGERALD,

Attorneys for Petitioner.

APPENDIX "A".

Opinion of the Court of Appeal.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Thomas Skala, Jeffrey Altman, Defendants-Appellants. Nos. 81-1373, 81-1416. D.C. No. CR 80-788-2-RJK.

Filed: July 27, 1982.

MEMORANDUM

Appeal from the United States District Court for the Central District of California.

Robert J. Kelleher, District Judge, Presiding.

Argued and submitted April 7, 1982.

Before: CHAMBERS, WALLACE and NORRIS, Circuit Judges.

Skala and Altman were convicted, after jury trial, of twenty counts of mail fraud (18 U.S.C. §1341) and they appeal asserting, among other things, that there was insufficient evidence to support their convictions. The essential elements of mail fraud are 1) a scheme or artifice to defraud, and 2) knowing use of the mails in the execution of that scheme or artifice. In pressing their arguments that the evidence was insufficient, appellants are bound by the well-established rule that the evidence is viewed, on appeal, in a light most favorable to the appellee — the government. *Glasser v. United States*, 315 U.S. 60 (1942). Moreover, we draw all reasonable inferences from the evidence in favor of the government. *United States v. Beecroft*, 608 F.2d 753, 756 (9th Cir. 1979). Given these ground rules, we have no hesitation in concluding that there was ample evidence to support these convictions. There is no real question but that the mails were used in the effort which was undertaken and which the government charged as being fraudulent. The

question on appeal is whether the evidence supported the jury's conclusion that the effort was indeed a fraudulent one, and that these two individuals participated in the scheme and had the requisite intent.

Skala was president of MCB Systems and Altman was secretary-treasurer. Through their efforts MCB Systems acquired Lexington Corporation which had published a book entitled "The Big Book of Banking and Industry" ("BBBI") Pector was aware that the book was not in existence and that no ads had as yet been ordered for inclusion in it. Nevertheless, using an alias, she called each victim company saying she was "verifying" its order for an ad. She also obtained the names of officials in the company. An invoice was then made up, addressed to an official for the unordered (but theoretically "verified") ad and placed in the mail. Included with the invoice was a document entitled "Big Book of Banking and Industry Information Statement," saying the "Big Book" had been published since 1971 and that the new seventh edition would be even bigger and better than the preceeding editions.

Addressees who requested further information as to the purported orders for the ads were given the names of other officials in the same companies and told the orders had been placed at earlier dates. Some were told that their "confusion" might be due to the fact that BBBI had formerly been published under another name. Several addressees did not bother with such inquiries but simply protested and reported the billing to the Better Business Bureau, the state attorney general, or the postal authorities.

Skala was informed of some of the protests but despite this knowledge he made the decision in August 1976 to send out computerized mailings to all whose accounts were "delinquent," threatening the cancellation of credit to "valued customers." A second similar mailing was later

sent out. The addressees included many victims who had unwittingly paid for the ads and many others who had denied having ordered any ad and had refused to pay.

By November 1976, appellants divested themselves of their interest in the Metalworking Machinery book and also the BBBI. A fictitious straw man, whom appellants named Yashika Mitsibishi, was shown as the owner in the sale to the new buyer. Part of the sales agreement was that the accounts receivable for BBBI were transferred to the new owner.

This record, particularly when read in the light of the presumptions available to the government on appeal, clearly supports the jury's conclusion that a scheme to defraud existed. Pector's sales pitch was untruthful whether or not the appellants intended to publish the BBBI. Moreover, their protestations that they had a good faith intent to publish it could, on this record, be rejected by the jury. The BBBI had not been published when the unordered ads were "verified," or when the invoices were sent out, or when the "Information Sheet" was distributed, or when the untruthful "explanations" were given to the inquiring addressees, or when the delinquency notices were sent out. Indeed the BBBI was never published by appellants and the evidence they offered of their intent to do so was very flimsy; the jury was entitled to disbelieve it. They offered little, if any, evidence of any sales activity that was not fraudulent. The best that could be offered was Pector's statement that she did not make untruthful statements to "every" customer.

Evidence to support the charge of appellants' participation in the scheme was largely circumstantial, which is not unusual in mail fraud cases. Appellants had financial control and were the controlling officers in the organization that was purporting to publish the BBBI and was accepting payments for the unordered ads in the nonexistent book. As

noted above, they offered practically no evidence that would support their claim that they intended to publish it. They hired Pector and obviously they had the right to fire her. But even after discontinuing the telephone solicitation effort, they kept her on and used her in collections work associated with the delinquency notices. Skala was aware of the receipt of protests from victims and yet he devised the computerized delinquency mailing program. Altman saw the invoices and knew of the contents of the very misleading "Information Statement" that was sent to the victims. But despite their knowledge, neither appellant took action to correct the situation. There is evidence they were present in Pector's office at times when she was making her fraudulent sales pitch and using her alias. There is evidence of the use of the alias in written materials mailed to the victims. But neither appellant did anything to correct the situation.

Intent to defraud may be inferred from knowledge that a scheme operates in a deceitful manner. *United States v. Beecroft, supra*, 608 F.2d at 759; *United States v. Piepgrass*, 425 F.2d 194, 199 (9th Cir. 1970). It may also be inferred from failure to put a stop to a deceitful scheme. *United States v. Kaplan*, 554 F.2d 958 (9th Cir. 1977). The use of an alias and of "fabricated excuses" may be circumstantial evidence of conscious deception. *United States v. Pearlstein*, 576 F.2d 531, 535 (3rd Cir. 1978). On this record there was more than enough evidence to support the jury's finding of a deceitful scheme and of appellants' participation in it. The jury was entitled to discount appellants' defenses of good intent to publish the BBBI, of lack of knowledge of Pector's activities, and of lack of ability to control Pector. Their reliance on *United States v. Pearlstein*, supra, is misplaced. There the defendants were agents of principals and it was the principals who were charged with

devising and operating the deceitful scheme. The factual situation here is clearly distinguishable.

Appellants argue that the proof adduced at the trial was at variance with the scheme as alleged in the indictment. The basis of this argument appears to be that Pector, while indicted with the appellants, had pleaded guilty when she testified at their trial. It is appellants' contention that the indictment's allegations that all appellants participated in the scheme could not now be proven. They argue that the appellants were, in fact, convicted on the basis of a theory that they ratified Pector's activities by sending the computerized delinquency notices as a preliminary to selling the BBBI. There is sufficient evidence in the record to convict each appellant and it is irrelevant that Pector was not tried with them. The indictment charges a variety of actions that constituted part of the scheme of artifice. It was not necessary to prove each allegation in order to convict appellants. See *United States v. Beecroft*, supra, 608 F.2d at 757. Moreover, any variance that might have existed was not material. Neither appellant can claim that he was inadequately informed of the charges and thus was unable to prepare his defense. The record refutes such a claim.

Appellants also argue that there was reversible error in the trial judge's decision to permit introduction of a large number of records and receipts, and many checks, in an attempt to demonstrate that appellants' companies had not spent any sums in an effort to publish the BBBI. Although all checks in an amount over $100 were subpoenaed, only about three-quarters of them were obtained. The decision to admit the materials was within the trial judge's discretion under Rule 403, Federal Rules of Evidence. Similarly, it was within the trial judge's discretion to permit the use of summary charts, particularly where, as here, the jury was given a cautionary instruction as to their use. We find no

suggestion on this record that the trial judge abused his discretion.

Finally, there was apparently some violation of the attorney-client privilege in the grand jury phase of this case but the trial judge considered all the instances of claimed violation in the light of the attorney's dual capacity as an officer of Lexington, and in the light of the circumstances under which the communications were made, many of which were not "confidential" at all. The judge's careful review of the situation resulted in his order suppressing some communications and not suppressing others. We have reviewed the record and we find no abuse of discretion on his part. The dismissal of an indictment is a very drastic sanction and there was not the overreaching and deception in this case that would have compelled such a sanction. See *United States v. Thompson*, 576 F.2d 784 (9th Cir. 1978).

Affirmed.

APPENDIX "B".

Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Jeffrey Altman, Defendant-Appellant. No. 81-1416.

Filed: November 30, 1982.

ORDER APPROVING SUBSTITUTION OF COUNSEL AND DENYING REHEARING

Before: CHAMBERS, WALLACE and NORRIS, Circuit Judges.

The stipulation for substitution of counsel for appellant Altman is approved.

The petition for rehearing is denied.